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EXECUTORY INTERESTS.

§ 1. DEFINITION.—Executory interests are divided into two classes: (1) Executory Uses, and (2) Executory Devises. An executory use is a limitation valid as a use, but void at common law as a remainder. An executory devise is a limitation valid in a will, but void at common law as a remainder. Fearne's celebrated definition of an executory devise is in substance as follows: "Such a limitation of a future estate in lands as the law admits in a will, though contrary to the rules of conveyancing at common law." Fearne on Rem., 386, 395.

§ 2. THE SACRED RULE AS TO EXECUTORY INTERESTS.—No limitation in a deed or will shall ever be considered an executory use, or an executory devise, if it can possibly be good at common law by way of remainder. It is said that if there be one rule of law more sacred than another, it is this. The reason is that as executory interests allow modes of limitation contrary to the common law, they are in derogation of it, and so are to be construed strictly. The law favors the old feudal remainder, and treats every limitation by way of *use*, or by way of *devise*, as a remainder, whenever as a remainder it would be well limited at common law. *Purefoy* v. *Rogers*, 3 Saund. 380, 388; Fearne, 394; Gray, Perpetuities, § 59; 20 Am. & Eng. Ency. Law, 913; 2 Minor's Ins. (4th ed.), 431.

§ 3. HOW TO RECOGNIZE EXECUTORY INTERESTS.—The *prima facie* presumption is always in favor of remainders. See the "Sacred Rule" above given. Hence the first thing to be considered, in order to decide whether a given limitation is an executory interest or not, is whether it would or would not be good in a feoffment, according to the common law rules governing remainders. If it *can be* good by way of remainder, then *it is a remainder*, and must stand or fall as such (see *infra*, § 8), and can never be regarded as an executory use or devise, although it may occur in a conveyance to uses or in a devise. But if the limitation would be *void at common law by way of remainder*, then,

if it occurs in a conveyance to uses, it is called an executory use; and if it occurs in a devise, it is called an executory devise.

§ 4. PRACTICAL TEST OF AN EXECUTORY INTEREST.—Examine the limitation, and decide whether as a remainder it is well limited. It will not be well limited as a remainder: (1) If by it a freehold is made to commence *in futuro;* or (2) if a fee simple is mounted on a fee simple, or if any limitation follows a fee simple; or (3) if a contingent remainder of freehold lacks a freehold support; or (4) if the limitation over is separated from the particular estate; or (5) if it is limited to take effect in derogation of the particular estate. Hence, in each of these cases the limitation cannot be good by way of remainder, and for this very reason it becomes an executory interest. 2 Jarm. Wills, 483.

§ 5. EXAMPLES OF EXECUTORY USES.—These occur in a conveyance to uses, and so there must be a *feoffee to use*, and a *cestui que use.*[1]

(1). Deed to A and his heirs to the use of B and his heirs from and after the marriage of B with F. Now is B's estate good by way of remainder? Manifestly not, since it is a freehold commencing *in futuro.* Therefore, B's estate cannot be a remainder, and hence it can be and is an executory use, being found in a conveyance to uses. It is called a *springing* use, as it springs up and takes effect on a future event.

(2). Deed to A and his heirs to the use of C and his heirs until B shall marry F; and from and after such marriage, to the use of B and his heirs. Is B's estate good by way of remainder? Manifestly not, for it mounts a fee on a fee. Then B's estate cannot be a remainder, and, therefore, it can be and is an executory use, being found in a conveyance to uses. It is called a *shifting* use, as it shifts, on B's marriage, from C to B.

N. B. A use is called *springing* when it limits a freehold to commence *in futuro;* a use is called *shifting* when it mounts a fee on a fee. See (1) and (2) *supra.*[2]

[1] The examples given of executory uses are supposed to take effect under the English Statute of Uses (or a similar statute), by which the use is executed, and he who has the *use* is deemed to have the *legal title.* But in Virginia there is no *general* statute of uses; and the examples here stated would take effect as executory *trusts.* For the extent of the Virginia Statute of Uses, see *infra,* § 15, note 1.

[2] SPRINGING AND SHIFTING USES.—In 20 Am. & Eng Ency. of Law, 909, these definitions are given: "Interests in realty created by such limitations [*i. e.,* "future interests in land which would be invalid if made in an assurance at common law"] are called executory interests, and may be divided into springing and shifting uses, and executory devises. A springing interest is an interest limited by way of use or de-

(3). Deed to A and his heirs to the use of B for twenty-one years; remainder to the use of the first unborn son of B, and the heirs of his body. Is the estate of B's unborn son good by way of remainder? Manifestly not, for it is a contingent remainder of freehold without a freehold support. Therefore, the estate to B's unborn son cannot be a remainder, and hence it can be and is an executory use. Gray, Perpetuities, § 58; 1 Am. & Eng. Ency. of Law, 927, note.

(4). Deed to A and his heirs to the use of B for life, and after B's death *and one week*, to the use of C and his heirs. Is C's estate good by way of remainder? Manifestly not, for there is a gap between it and the particular estate. Then, as it cannot be a remainder, it can be and is an executory use. For an example of a limitation over taking effect in derogation of the particular estate, see *infra*, § 7.

It will be remembered that in each of the above examples, A is feoffee to uses, and stands seised to the use, and is called the *reservoir of seisin*. The uses are executed, as they arise, by the Statute of Uses (27 Hen. 8, ch. 10), he who has the *use* being deemed in lawful seisin and possession, *i. e.*, to have the *legal title*.

§ 6. EXAMPLES OF EXECUTORY DEVISES.—These do not require the aid of uses, but they must be found in a devise, and then are permitted by way of indulgence to testators.

(1). Devise to B and his heirs from and after his marriage with F. Is B's estate good by way of remainder? Manifestly not, because it is a freehold to commence *in futuro*. Therefore B's estate cannot be a remainder; and hence it can be and is an executory devise, being found in a will. Compare this example with a springing use.

(2). Devise to C and his heirs; but on the marriage of B. with F, then to B and his heirs. Is B's estate good by way of remainder? Manifestly not, because it mounts a fee on a fee. Therefore B's estate

vise to take effect at a future time independently of, without being supported by, and without affecting, any prior interest of the measure of freehold created by the same instrument. A shifting interest is an interest so limited as to arise in derogation or defeasance of another interest of the measure of freehold created by a preceding limitation. If created by way of use, these interests are called springing and shifting uses; if by will, springing and shifting devises, or more commonly executory devises indiscriminately. Conditional limitation is a common term for shifting uses and shifting executory devises, as well as the limitations by which they are created. A contingent use, strictly speaking, is a remainder limited by way of use, but the term is used loosely to designate all future uses, and sometimes even to distinguish springing and shifting uses from those limited by way of remainder." In Gray, Perpetuities, § 54, it is said: "When a use or devise takes effect on the determination of preceding estates created at the same time, it is a remainder limited by way of use or devise. When a use cuts short another granted estate, it is called a shifting use. When it cuts short the estate of the person creating it, it is called a springing use."

cannot be a remainder; and hence it can be and is an executory devise, being found in a will. Compare this example with a shifting use.

(3). Devise to B for twenty-one years; remainder to the first unborn son of B and the heirs of his body. Is the estate of the unborn son good by way of remainder? Manifestly not, because it is a contingent remainder of freehold without a freehold support. Therefore it cannot be a remainder; and hence it can be and is an executory devise, being found in a will. See Fearne, 395; 2 Jarm. Wills, 484

(4). Devise to B for life, and after B's death, *and one week*, to C and his heirs. Is C's estate good by way of remainder? Manifestly not, for there is a gap between it and the particular estate. Therefore C's estate cannot be a remainder, and hence it can be and is an executory devise. Fearne, 398. For an example of a limitation over taking effect in derogation of the particular estate, see *infra*, § 7.

§ 7. CONDITIONAL LIMITATIONS.—These constitute an important class of executory interests, void at common law as remainders, but allowed in wills, and in deeds by way of use. In a conditional limitation there is a limitation of an estate to A, which, however, on a certain condition subsequent, is limited over to B. Under this head may be ranked a fee on a fee by way of executory devise, or by way of shifting use, as has been explained above. But there is another species of conditional limitation which now demands special attention, and which can be best understood by an example. Suppose by feoffment at common law land is conveyed "To A for life: provided, however, that if C returns from Rome during A's life, A's life estate shall cease, and the land shall go to B and his heirs." The estate of B is called a *conditional limitation*, because it is an estate *limited* over to B after A's prior estate on *condition*. Now suppose C does return from Rome, can the limitation over to B take effect? It cannot as a remainder, for every remainder must, *ex vi termini*, await the regular expiration of the particular estate, and cannot cut it short, and take effect in derogation of it. And if the limitation to B is to depend on the doctrine of conditional estates, it fares no better. For an estate granted on condition does not end *ipso facto* when the condition is broken. The feoffor must enter and divest the estate; for he may waive the breach of condition if he chooses. And by the doctrine of maintenance *no one but the feoffor or his heirs* can make the entry; for nothing at common law that lies in action, entry, or re-entry

can be granted over. It follows that on C's return from Rome, B cannot himself enter on the land, but must wait for the entry of the feoffor. But suppose the feoffor enters. The effect is to annul the seisin given to A *ab initio*, and to revest the land in the feoffor as of his old estate. But on this seisin *the limitation to B depended;* and, therefore, the annulling of A's estate destroys B's also. And for these reasons conditional limitations are void at common land. But, as stated above, they are permitted under the statutes of uses and devises. For, as executory interests, they may take effect in derogation of the preceding estate; and no entry by the feoffor or his heir is necessary, because in a devise, or in a deed to uses, the happening of the contingency, or the non-performance of the condition, *ipso facto* determines the estate of the first taker, and vests it in the other to whom it is limited. "A conditional limitation is, therefore, of a mixed nature, partaking both of a condition and of a limitation; of a condition because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the expectant interest without entry or claim." *Brattle Square Church* v. *Grant*, 3 Gray (Mass.), 142 (63 Am. Dec. 725), *per* Bigelow, J.; Fearne, 274, 382, n. (a); 2 Jarm. Wills, 485; *Camp* v. *Cleary*, 76 Va. 140; 20 Am. & Eng. Ency. Law, 912.

§ 8. REMAINDERS IN DEEDS BY WAY OF USE, AND IN DEVISES.— We have seen that there can be remainders by way of use, and that a limitation in a deed to uses must be considered a remainder, unless it violates the rules governing remainders. Thus, a deed "To A and his heirs, to the use of B for life, remainder to the use of B's first unborn son and the heirs of his body," violates no rule for remainders, and is simply doing, by way of uses, what could as well be done directly, without uses. Hence, the limitation to the unborn son cannot be considered an executory use, but is simply a *contingent remainder by way of use.*

Again, it must not be thought that because a future limitation occurs in a will, it is therefore an executory devise; for there can be a remainder in a will, and the limitation must be considered a remainder, unless it violates the rules governing remainders. Thus, "Devise to A for life, remainder to the first unborn son of A who shall reach the age of twenty-five years," violates no rule for remainders, and is simply an example of a *contingent remainder by will.* And it will be seen that this example does not violate the rule against perpe-

tuities for contingent remainders, for there is no estate given to an unborn person for life, followed by a remainder to the child of such unborn person. But at common law it runs the risk of failing, in case A dies before his son reaches the age of twenty-five years.

And it must be observed that in conveyances to uses, where the uses are executed by the Statute of Uses and turned into legal estates, contingent remainders are subject to all the rules of the common law, and will fail if they are not ready to vest at the natural termination of the particular estate; and may be destroyed by forfeiture and merger. Fearne, 392–95; 20 Am. & Eng. Ency. Law, 883, 913. But, on the other hand, if there are contingent remainders in *trust estates,* that is, in England, in *unexecuted uses,* the common law rules as to the seisin do not apply to such remainders (the seisin remaining in the trustees), and they do not require to vest *eo instanti,* and are indestructible. See *Abbiss* v. *Burney,* 17 Ch. D. 211; Fearne (304); Wms. R. P. (17th ed.), 430, 473; Gray, Perpetuities, § 325, note 1; 20 Am. & Eng. Ency. Law, § 884.

§ 9. RULES FOR EXECUTORY DEVISES.—(1). In general, when one limitation in a will is taken to be an executory devise, all subsequent limitations must likewise be so taken. Thus, if one limitation after a fee simple is an executory devise, others are *a fortiori;* so if one freehold *in futuro* is followed by a second, or one conditional limitation by another; and so in other cases. Fearne on Rem. (503); 3 Lom. Dig. (311); 20 Am. & Eng. Ency. Law, 950.

(2). A limitation once good as a contingent remainder cannot afterwards be construed as an executory devise. But if the devisee of a particular estate on which the contingent remainder depends dies in the lifetime of the testator, then the limitation may be good as an executory devise. For before the will takes effect, the particular estate lapses; hence when the will operates, there is no such estate. Fearne on Rem. 525; 2 Washb. R. P. (348); 2 Minor's Ins. (4th ed.), 447; 2 Jarm. Wills, 496; *Carter* v. *Tyler,* 1 Call (Va.). 165.

(3). But an executory devise in the original form of the limitation may become, by after event, a contingent remainder. See Fearne, 526; 2 Minor's Ins. 445, 448; 2 Jarm. Wills, 498; *Evers* v. *Challis,* 7 H. of L. Cas. 531.

(4). "It has been held that where an executory devise is limited *per verba de præsenti,* that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, then the devisee must

be a person capable at the death of the devisor, or the devise will be void." Fearne on Rem. (533). Under this, such distinctions as these were taken: Devise to heirs of J. S., when J. S. is living at death of testator, is void; but to the heirs of J. S., *after death of J. S.*, is good. So, to first son of A, A having none, is void; but to the first son of A, *when A shall have one*, is good, because the devisor takes notice that A has no son, and intends a future gift. Fearne denies the distinction, and thinks all the cases good. Fearne, (495, 534.) And see 2 Minor's Ins. 449; Tied. R. P., § 533; 20 Am. & Eng. Ency. Law, 927.[1] A devise to a child *en ventre sa mere* is undoubtedly good, though formerly doubted. Fearne on Rem. (536); 3 Lom. Dig. (322); 2 Minor's Ins. 449. And a bequest to a corporation not yet created is good, if the intent be clear that the charter shall be obtained within the time prescribed by the rule of perpetuities, as where the testator directs his executors to apply therefor. *Inglis* v. *Trustees, &c.*, 3 Pet. 115; *Lit. Fund* v. *Dawsons, &c.*, 10 Leigh, 152; s. c., 1 Rob. 418; *Kinnaird* v. *Miller*, 25 Gratt. 107; 2 Minor's Ins. 444.

(5). An executory devise of a fee on a fee is not affected by the failure of the first estate to take effect by lapse or otherwise; but that which was to be an *executory* devise is accelerated, and becomes a devise *in præsenti*, and takes effect at the death of the testator. Thus in a devise "To A and her heirs; but if A dies under twenty-one and unmarried, then to B and his heirs," with a residuary devise to C; if A dies under twenty-one and unmarried *before the testator dies*, the

[1] DEVISE PER VERBA DE PRÆSENTI AND PER VERBA DE FUTURO.—In 20 Am. & Eng. Ency. Law, 927, it is said: "Formerly it seems to have been held, that when an executory devise was limited *per verba de præsenti*, that is, when the devisee was mentioned as a person *in esse*, and the commencement of the estate devised was not expressly deferred to a future period, the devise was void unless the devisee was capable of taking possession at the death of the devisor; otherwise if the devise was *per verba de futuro*, and expressly deferred to a future period. This distinction, if valid at all, is equally applicable to springing uses, but its validity is extremely questionable." And in 2 Minor's Ins. (4th ed.), 449, the law is thus stated: "At present, however, this needless distinction between limitations to non-existing persons, *per verba de præsenti* and *per verba de futuro*, is very little regarded, and is allowed to affect those cases only where there is not the least circumstance from which to collect the testator's or grantor's intention of anything else than an immediate limitation to take effect *in præsenti*." Jarman seems to ignore the distinction. Thus in speaking of an executory devise of a freehold to commence *in futuro*, he says (2 Jarm. Wills, 483): "The first-mentioned species of executory estates occurs as well when the devise is future in its operation from the non-existence of the object at the death of the testator, as when it is future in the express terms of its limitation. Thus a devise to the children of A, who happens to have no child at the death of the testator, or to the heirs of the body of A, a person then living, is executory for the reason suggested."

executory devise to B takes effect immediately on the death of the testator, and does not lapse in favor of the residuary devisee, C. Fearne (510); 2 Wash. R. P. (355); 3 Lom. Dig. 314; *Mathis* v. *Hammond*, 6 Rich. Eq. (S. C.) 121; *Avelyn* v. *Ward*, 1 Ves. Sr. 420. But see *Allen* v. *Parham*, 5 Munf. (Va.) 467.

§ 10. RULE OF PERPETUITIES FOR EXECUTORY INTERESTS.—Any executory interest which, by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ab initio* void. In other words, the executory interest is void for remoteness if at its creation there exists a *possibility* that it may not take effect during any fixed number of now existing lives, nor within twenty-one years and ten months after the expiration of such lives, even though it is highly probable, or, indeed, almost certain, that it will take effect within the time prescribed. In the application of the rule, twenty-one years are allowed independently of any person's actual minority, but the ten months (period of gestation) are allowed only when there is a child *en ventre sa mere*. See 2 Bl. Com. (Sharswood's ed.) 174, n. 14; 2 Bl. Com. (Cooley's ed.) 175, n. 12; Tied. R. P., § 544; 1 Jarm. Wills (5 Am. ed.), 502; Wms. R. P. (318); Gray, Rule against Perpetuities, §§ 201–268; 90 Am. Dec. 101–106, n.; 18 Am. & Eng. Ency. Law, 335; *McArthur* v. *Scott*, 113 U. S. 340, 382; *Hopkins* v. *Grimshaw*, 165 U. S. 342, 355; *Stone* v. *Nicholson*, 27 Gratt. 1; *Woodruff* v. *Pleasants*, 81 Va. 37, 42; *Otterback* v. *Bohrer*, 87 Va. 548; *Whelan* v. *Reilly*, 3 W. Va. 597, 612.[1]

[1] RULE AGAINST PERPETUITIES.—In *Hopkins* v. *Grimshaw*, 165 U. S. 342, 355, the rule is stated by Gray, J., as follows: "An estate, legal or equitable, granted or devised by one person to another, which, by the terms of the instrument creating it, is not to vest until the happening of a contingency, which, by possibility, may not occur within the period of a life or lives in being (treating a child in its mother's womb as in being), and twenty-one years afterwards, is void for remoteness." That a child *en ventre sa mere* may be considered a *life in being*, so as to omit in the statement of the rule reference to the period of gestation, see Gray, Perpetuities, § 201, § 220; 1 Jarm. Wills, 518; 18 Am. & Eng. Ency. Law, 341. And the same authorities show that there may be *two periods of gestation* allowed in the same limitation; for in a devise to such of the testator's grandchildren as shall reach the age of twenty-one, a child of the testator might be *en ventre sa mere* at the testator's death, and such child might die leaving a posthumous child, who would nevertheless be entitled on reaching the required age. See Gray, Perpetuities, § 221, § 370; 18 Am. & Eng. Ency. Law, 341. Indeed, Gray (Perpetuities, § 222) supposes a case where a *third* period of gestation might be allowed. And in Jarman, Wills, p. 517, it is said: "To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life, or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mere* is consided as a life in being."

For examples of limitations that do, or do not, violate the Rule against Perpetuities, see 2 Va. Law Reg. 123.

§ 11. UPON WHAT STATE OF FACTS DOES REMOTENESS DEPEND.—In applying the Rule against Perpetuities, it should be borne in mind that the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will. See 1 Jarm. Wills (5th Am. ed.), 519; Gray, Perpetuities, § 231; 18 Am. & Eng. Ency. Law, 341, 347; *McArthur* v. *Scott*, 113 U. S. 340, 382; *Pleasants* v. *Woodruff*, 81 Va. 37, 42. It follows that a devise which would have been void if the testator had died immediately after making his will may be valid under the circumstances existing at his death. Thus, the example, "Devise to the first son of A (A being alive at the testator's death) who shall attain the age of twenty-five years," is void for remoteness; but if A were to die before the testator, leaving a son, the gift to the son would be valid; for though the estate of the son is not to vest until the son reaches twenty-five, yet it must necessarily take effect, if at all, within a life in being at the testator's death, viz., the son's own life. And the devise would also be valid if a son of A had attained the age of twenty-five before the testator's death, although A survived the testator. See Wms. R. P. (17th ed.) note (1), citing 1 Jarm. Wills (4th ed.), 254; (5th Am. ed. 529); *Picken* v. *Matthews*, 10 Ch. D. 264. And see Gray, Rule against Perpetuities, § 379.[1]

§ 12. ARE THERE TWO RULES AGAINST PERPETUITIES, ONE FOR CONTINGENT REMAINDERS AND ANOTHER FOR EXECUTORY INTERESTS?—Mr. Williams, in his authoritative work on Real Property, contends that there are *two different rules*. See Wms. R. P. (17th ed.) 469. But in Gray's Rule against Perpetuities, it is argued,

[1] PAST THE AGE OF CHID-BEARING.—No matter how old a person may be at the death of the testator, the law still presumes the possibility of issue, and thus a gift may be void for remoteness. See 18 A. & E. Ency. Law, 347; *In re* Dawson, 39 Ch. D. 155; *Carney* v. *Kain* (W. Va.), 23 S. E. 650, 657, citing *List* v. *Rodney*, 83 Pa. St. 483, 492. In Gray on Perpetuities, the law is thus stated: "In one class of cases, from the difficulty and delicacy of determining the question involved, the occurrence of a contingent event beyond the required limits will be considered as possible, although it is physically impossible. If a devise be made to those of a woman's children who reach twenty-five, the gift is too remote, although the woman be of such an age [at the testator's death] that it is certain that she can have no more children, and therefore the event must occur, if at all, in the lives of persons in being, viz.: of her children alive at the testator's death. In other words, for the purpose of determining questions of remoteness, men and women are deemed capable of having issue so long as they live. This was held by Sir Lloyd Kenyon in *Jee* v. *Audley*, 1 Cox, Ch. 324, and his decision has never been questioned." *Jee* v. *Audley* is followed in the case of *In re Dawson, supra;* and on a question of remoteness, it was held that evidence was inadmissible to show that a woman over sixty years of age at the testator's death was past the age of child-bearing.

with great force and learning, that there is but one rule against perpetuities, namely, that "No interest subject to a condition precedent is good, unless the condition *must* be fulfilled, if at all, *within twenty-one years from some life in being* at the creation of the interest," and that this rule applies alike to contingent remainders and to executory interests. See Gray, § 201; also, §§ 284–298. And see, for further discussion of the question, 1 Jarm. Wills, 521–'28; 3 Id. App'x, 711; 18 Am. & Eng. Ency. Law, 342, note; 20 Id. 876, note; 90 Am. Dec. 103, note. But the view of Mr. Williams has recently received judicial approval in England, in *Whitby* v. *Mitchell*, 42 Ch. D. 494 (also, 44 Ch. D. 85), where it is held that a remainder limited in a settlement to the children of an unborn person, after a life estate to the unborn parent, was void, and could not be made good by saying, "provided that such children shall be born within a life or lives now in being, and twenty-one years afterwards"; thus showing that the rule for contingent remainders, which declares that an estate cannot be limited to an unborn person for life, followed by any estate to a child of such unborn person, is considered in England *an independent rule*, and not merely an instance of the rule by which executory interests are restrained. For further explanation of the decision in *Whitby* v. *Mitchell*, see Wms. R. P. (17th ed.) 469–472; 18 Am. & Eng. Ency. Law, 342, note. See, also, L. Q. R. Jan. 1899, 71. But see *In re Frost*, 43 Ch. D. 246.

§ 13. ARE THERE TWO RULES AGAINST PERPETUITIES IN VIRGINIA.—Whether Professor Gray is right or not in his contention that *there never was but one rule*, namely, the rule requiring future estates to take effect during existing lives, etc., it would seem necessary, *under the Virginia statute*, to apply this rule to contingent remainders, in order to prevent them from tying up lands beyond the bounds of public policy. At common law, a safeguard against the inalienability of lands by the creation of contingent remainders was found in the rules governing the *seisin*, and in the requirement that a contingent freehold remainder must vest, if at all, during the particular estate, or at the moment of its termination. This rule was *re-enforced* by the rule against perpetuities for contingent remainders, namely, that no estate can be given an unborn person for his life, followed by a remainder to the child of such unborn person. But now, in Virginia (C. V., § 2424), "A contingent remainder shall in no case fail for want of a particular estate to support it," and the remainder may vest at any time in the future after the particular estate has terminated. Thus, if there

be a deed "To A for life, remainder to the first unborn son of A who shall reach the age of forty-five years," A might not have a son until ten months after A's death, and then the remainder could not vest until the son reached the age of forty-five years; and yet the remainder would not fail, under the Virginia statute, for want of a freehold support. But this might tie up the land beyond twenty-one years after existing lives (in this case the life of A), unless the rule of perpetuities for executory interests be applied to the case; and this, it is believed, would be done in Virginia. See *Moon* v. *Stone*, 19 Gratt. 130; *Stone* v. *Nicholson*, 27 Id. 1. And see, in accord with this view, Hopkins, Real Prop. 326; Gray, Perpetuities, § 286; 18 Am. & Eng. Ency. Law, 342. In 20 Am. & Eng. Ency. Law, 894, it is said: "It would seem that legislation which, either directly or indirectly, has the effect of making a contingent remainder indestructible would, almost necessarily, have the further effect of subjecting it to the rule against perpetuities [for executory interests], since it was originally exempted from its operation solely on the ground of its destructible character." [1]

§ 14. EXECUTORY INTERESTS IN PERSONALTY.—In 2 Jarman, Wills (5th Am. ed.). 501, it is said: No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is, in its nature, executory." The reason is, that the common law doctrine as to *estates* in land was held inapplicable to chattels, in which the law recognized nothing but absolute ownership; so that a gift to A of a chattel, real or personal, vested in A the entire interest; and the result was the same if the gift was to A for his life, or otherwise. In each case A, at law, was the absolute owner; there was no reversion in the donor,

[1] RULE OF PERPETUITIES FOR CONTINGENT REMAINDERS IN VIRGINIA.—It does not follow that because now in Virginia contingent remainders, as indestructible interests, are subjected to the rule of perpetuities for executory interests, that therefore they are exempted from the operation of the rule (now declared to exist in England) which forbids the gift of an estate to an unborn person for life, followed by a remainder to the child of such unborn person. For if the decision in *Whitby* v. *Mitchell*, 42 Ch. D. 494, be followed in Virginia, the limitation to the child of an unborn parent, after a life estate to the parent, is not validated by expressly confining the remainder to such child of the unborn parent as shall be born within the compass of lives existing at the time of the gift, and twenty-one years afterwards (see *ante*, § 12); and to such a limitation the rule forbidding successive life estates to unborn persons is still applicable. And see 2 Minor's Ins. (4th ed.), 414, which seems to recognize the old doctrine forbidding a possibility on a possibility, from which the rule invalidating a limitation, by way of remainder, to the unborn child of an unborn child, after a life estate to the unborn parent, has been said to be derived. See L. Q. R., Jan. 1899, p. 71. But see L. Q. R., July, 1898, p. 234.

and a remainder over to a third person was void—just as in land there can be no remainder after a feoffment in fee simple. See Fearne, Remainders, (3), n. (c); also (401); 2 Bl. Com. (174); Wms. Real Prop. (6th Am. ed.), 291; Wms. Pers. Prop. (4th Am. ed.) (7), (259); Gray, Perpetuities, § 117; 2 Minor's Ins. (4th ed.), 433; 20 Am. & Eng. Ency. Law, 908, 930.

In his definition of an executory devise, Fearne (p. 385) includes a future estate in *personalty* (though stating that it is more properly an executory *bequest*), and declares it to be "such a future estate in lands or chattels . . . as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." And on page (401) he says: "The third sort of executory devises, comprising all that relate to chattels, is where a term for years, or any personal estate, is devised (more properly, bequeathed) to one for life, or otherwise; and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to some one else. Such ulterior limitation was void at common law, and the whole property vested in the person to whom it was limited for life; though there was, indeed, a distinction taken between a devise (or rather, bequest) of the *use* of a personal thing and of the thing itself. Thus where the will was that A should use such a thing during his life, and afterwards that B should have it, the limitation over was agreed to be good; but if the first disposition had been of *the thing itself* to one for life, and after to another, then the devise over would have been void. But the doctrine has gradually obtained, and is now settled, that such limitations over in a will, or by way of trust, are good." For an example of a future estate in personalty by will, see *Pettyjohn* v. *Woodroof*, 77 Va. 507. But there can be no future estate in chattels which are consumed in the using—*quæ ipso usu consumuntur*, as wines, etc. See Wms. Pers. Prop. 262; 2 Minor's Ins. 434; *Dunbar* v. *Woodcock*, 10 Leigh, 628.

It will be noticed that Fearne does not say that a future interest in chattels may be created by way of *use*, but by way of *trust*. The reason is that the Statute of Uses has no application to personal property. 2 Bl. Com. (336); Gray, Perpetuities, §§ 73, 79; 20 Am. & Eng. Ency. Law, 933. Nor does Fearne state that a future interest in chattels can be created by deed *otherwise* than by way of trust. And this is in conformity with the law as it is still held in England. Wms. R. P. (6th Am. ed.), 292; Wms. Pers. Prop. (4th Am. ed.), 261; Gray, Perpetuities, §§ 76, 78; 20 Am. & Eng. Ency. Law,

934. But in the United States it is said that "the weight of authority sustains the position that future limitations of chattels, real or personal, may be created by deed as well as by will, without the intervention of trustees; and that under such limitations both the life legatee and the ulterior legatee take legal, as distinguished from equitable, interests." 20 Am. & Eng. Ency. Law, 934. And see *Carney* v. *Kain* (W. Va.), 23 S. E. 650, 656; 2 Minor's Ins. (4th ed.), 433–34. For full discussion, see Gray, Perpetuities, §§ 71–98, where the conclusion is reached that in the United States, with the exception of North Carolina, *legal* future estates in personalty can be created by deed *inter vivos*.[1]

[1] FUTURE ESTATES IN PERSONALTY.—In Wms. Pers. Prop. (267), it is said: "As no estates can subsist in personal property, it follows that the rules on which contingent remainders in freehold lands depend for their existence have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of the executory devises and shifting uses. . . . If, therefore, a gift be made of personal property to trustees, in trust for A for his life, and, after his decease, in trust for such son of A as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A for his life, and after his decease, to such son of A as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests [*i. e.*, the *arising* of such interests] within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist, applies equally to personal as to real estate." And see, as to the application of the rule against perpetuities to future estates in chattels, Gray, Perpetuities, § 117; also §§ 319-321.

It may be further remarked, with reference to limitations of personalty, that there are no estates-tail in chattels, whether personal or real; and the words which create an estate-tail in land, whether expressly or by implication, confer the whole interest in personalty; *i. e.*, an interest corresponding to a fee simple estate in realty. Fearne, Remainders (463); Wms. Pers. Prop. (264); 3 Jarm. Wills, 374. Hence, a gift of personalty to A and the heirs of his body, followed by a limitation over to B, on the indefinite failure of the issue of A, gives A the whole interest, and the limitation over to B, is void as violating the rule against perpetuities; whereas, in the same case, as to realty, A would have a fee tail, and B a vested remainder. But in gift of personalty, "To A and the heirs of his body, and if A die without issue *living at his death* (or other words which make the failure of the issue definite), then to B," the limitation to B is good, as it cannot violate the rule againt perpetuities. See Fearne (470), (477); Hawkins, Wills, 208; *Wilkinson* v. *South*, 7 T. R. 555. And because of the fatal effect of an indefinite failure of issue on a limitation over of personal property, we are told by Fearne (476), that "courts in the case of personal estate generally incline to pay attention to any circumstances or expression in the will that seems to afford a ground for construing a limitation after dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over." It has resulted that the rules of construction are not in all cases the same, as to definite and indefinite failure of issue, in wills of realty and personalty; and some expressions which make a definite failure of issue as to personalty are insufficient for that purpose as to realty. For review of Virginia cases, see 1 Tuck. Com., Book II, 158-161; 2 Minor's Ins. 442-'43.

It should be added, that, by analogy, the Rule in Shelley's Case has been held to

§ 15. EXECUTORY INTERESTS UNDER VIRGINIA STATUTES.—The policy in Virginia is to allow the same limitations *directly by deed* which were formerly good only by way of executory use or executory devise. See §§ 5–7, *supra*.

(1) Statute taking effect January 1, 1820: "Any estate may be made to commence *in futuro* by deed in like manner as by will." 1 Rev. Code, 1819, ch. 99, § 28; Code, 1887, § 2418. So by *any deed* in Virginia a *freehold* can commence *in futuro*.

(2) Statute taking effect July 1, 1850: "Any estate which would be good as an executory devise or bequest shall be good if created by deed." Code, 1849, ch. 116, § 5; Code, 1887, § 2428. This statute destroys the distinction between devises and deeds as to the validity of executory interests, and sanctions the doctrines of executory *devises* and *bequests* as equally applicable to *deeds;* thus permitting a fee on a fee by way of deed, and validating by deed without uses the other limitations which were formerly void except when found in a will, or in a deed by way of use.[1]

operate upon gifts of personal property where the requisites are present which would render it applicable in a conveyance of realty; so that, for example, a gift of a term of years to A for life, remainder to the heirs of his body, gives A the whole property by the Rule in Shelley's Case, and the heirs of his body take nothing. Fearne (491); Wms. Pers. Prop. (267); 3 Jarm. Wills (376); 2 Minor's Ins. (4th ed.), 407; 22 Am. & Eng. Ency. Law, 512; 11 Am. St. R. 106, note; *Hughes* v. *Nicklas* (Md.), 14 Am. St. R. 377. But the rule is not so imperative as to personalty as it is in limitations of realty; and it will yield to evidence of intention, apparent on the face of the will, that the words "heirs," "issue," etc., are intended as words of purchase. See Gray, Perpetuities, § 647, n. 3; *Ex parte* Wynch, 5 De G. M. & N. 188; *Smith* v. *Butcher*, 10 Ch. D. 13. In Virginia, the Rule in Shelley's Case has been abolished as to personalty by the same statute which abolished it as to real estate. C. V., § 2423.

[1] EXECUTORY INTERESTS IN VIRGINIA.—Besides the statutes mentioned in the text, two other statutes may be considered as to their effect on executory interests in Virginia:

1. Act of January 1, 1787 (the Virginia Statute of Uses), giving effect to the deeds of bargain and sale, lease and release and covenant to stand seised to use, and declaring that "the possession [*i. e.*, legal title] of the bargainor, releasor or covenantor, shall be deemed transferred to the bargainee, releasee or person entitled to the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant." Code Va., § 2426. Under this statute, by bargain and sale or covenant to stand seised, it seems (1) that a freehold could be made to commence *in futuro* before the Act of 1820, above cited, declaring that "any estate may be made to commence *in futuro* by deed in like manner as by will"; and (2) that a fee could be limited on a fee before the act of July 1, 1850, above cited, declaring that "any estate which would be good as an executory devise or bequest shall be good if created by deed." See Gray, Perpetuities, §§ 55-66; 2 Minor's Ins. (4th ed.) 431, 808, 905; *Camp* v. *Cleary*, 76 Va. 140; *Ocheltree* v. *McClung*, 7 W. Va. 232.

2. Act of July 1, 1850, declaring that "all real estate, as regards the conveyance of the immediate freehold thereof, shall be deemed to lie in grant as well as in livery." Code Va., § 2417. Under this statute it seems that, by deed of grant, a freehold can be made to commence *in futuro* without the aid of the act of 1820; and that a fee

§ 16. DEFINITE AND INDEFINITE FAILURE OF ISSUE.—A failure of issue is called *definite* when it is to take effect by the terms of the limitation at some *certain time;* it is called *indefinite* when it may occur at any time in the future. At common law the presumption is in favor of an indefinite failure, when a limitation over is to take effect on death without issue. Thus, "Devise to A for life, and if A die without issue, then to B and his heirs," imports an indefinite failure of the issue of A; and the meaning is that B is to take, not only in case A has no issue living at the time of his death, but also in case A has issue living at his death, if in the thereafter such issue should fail at any future time. In other words, A is said to "die without issue" whenever A is dead and A's issue is extinct, no matter when the issue fails. In this sense Adam would have "died without issue" if there had been no survivors of the flood, and might even do so now if all of his descendants should perish from off the face of the earth. Wms. R. P. 290; 3 Jarm. Wills, 296; Gray, Perpetuities, §§ 211–213; 11 Am. & Eng. Ency. Law, 899–912.[1]

could be mounted on a fee, even if the statute of July 1, 1850, had not been enacted, declaring that "any estate which would be good as an executory devise or bequest shall be good if created by deed." See 2 Minor's Ins. (4th ed.) 779, where it is said: "Under the statute of grants, by means of a grant an estate of freehold in lands may be made to commence at a future time, and an estate in fee simple, after having become vested, may be made to shift, upon the occurrence of a future contingency, from one to another, as at common law could not be done at all; and before this statute could be done only by means of wills, and very imperfectly with us by means of the conveyances under the statute of uses [but see, as to a freehold to commence *in futuro*, the statute of 1820]; the statute of grants thus introducing a new class of executory or future limitations, namely, executory or future *grants*, in addition to executory or future *devises* and executory or future *uses*." See, also, 2 Minor's Ins. 430, 827; Gray, Perpetuities, §§ 67, 68.

[1] DEFINITE AND INDEFINITE FAILURE OF ISSUE.—The meaning of "definite" and "indefinite," as applied to a failure of issue, is thus clearly stated by Kent: "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A, but if he *dies without lawful issue living at the time of his death.* An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain or definite period within which it must happen. It means the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event." 4 Kent's Com. (11th ed.), *274.

The rule is well settled that words referring to the death of a person without issue, unexplained by the context, and in the absence of a statute changing their meaning, are construed to import a *general indefinite failure of issue—i. e.*, a failure or extinction of issue *at any period.* 3 Jarm. Wills, 297.

But the common law presumption of an indefinite failure of issue is a rule of construction, and not a rule of law; and it may be rebutted by the context if it clearly appears that a definite failure was intended. 3 Jarm. Wills, 308. Thus words may be used clearly confining the failure of issue to the death of the person who first takes, or some other person; as *e. g.*, "If A die without issue living at his death;" or, "If A shall die under the age of twenty-one and without issue" (*Withers* v. *Sims*, 80 Va. 651);

§ 17. EFFECT OF A LIMITATION OVER, DEPENDENT ON IF HE DIE WITHOUT ISSUE, ON A PRIOR ESTATE FOR LIFE.—Take the limitation, "To A for life, and if A die without issue, then to B and his heirs," and suppose it to occur in a will, and that the failure of issue is indefinite. Then A takes a fee tail, and B a vested remainder in fee simple. A's life estate is *raised* (or enlarged) to a fee tail by implication, in order to effectuate the intent of the testator. The grounds of the implication may be thus stated. The word "issue" in a will is equivalent to "heirs of the body." Hence, a devise, "To A and his issue," gives A an estate tail; and so does a devise "To A for life, remainder to his issue," by the Rule in Shelley's Case. Now, when the failure of issue is indefinite (*i. e.*, a failure at any time in the hereafter) the word "issue" is not confined to descendants in the *first* degree (*i. e.*, children), but comprises *all* the descendants, as a class of persons to take indefinitely in succession (*i. e.*, by continuous descent to children's children *in infinitum*). If now there is a devise "To A for life, and if A die *without* issue, then to B and his heirs," there is a presumption of intent that if A dies *with* issue, they are to take. For the estate of B is not to take effect unless A dies without issue, which implies that on A's death with issue, they are to succeed him. Hence, the construction is, "To A for life, remainder to issue of A; and if A die without issue (*i. e.*, in default of issue of A), remainder to B and his heirs." And this, as we have seen, gives A a fee tail by the Rule in Shelley's Case, by which rule, "To A for life, remainder to the issue of A," is equivalent to "To A and his issue." *Bradley* v. *Cartwright*, L. R. 2 C. P. 511, 524; *Roddy* v. *Fitzgerald*, 6 H. of L. Cas. 823, 877; *Ralph* v. *Carrick*, 11 Ch. D. 883; *Tate* v. *Talley*, 3 Call, 354; *Jiggetts* v. *Davis*, 1 Leigh, 419; *Wine* v. *Markwood*, 31 Gratt. 43, 51; 3 Jarm. Wills, 283; 2 Minor's Ins. (4th ed.) 456.[1]

or, "If A should die without issue, living B, his brother." And, as stated by Gray (Perpetuities, § 213, note 2), "A definite failure of a man's issue is not necessarily a failure at his death; a failure in any particular generation or generations of his descendants is equally definite. Whether such gift [*i. e.*, a gift to take effect after a definite failure of issue] would be too remote can easily be determined. Practically, the question always arises between a definite failure at his own death, and an indefinite failure in any generation." For full discussion of the expressions which have been held to denote a definite failure of issue, see 3 Jarm. Wills (5th Am. ed.), 308-339; Hawkins, Wills (2d Am. ed.), 205-212; 2 Minor's Ins. (4th ed.), 440-443 (where the Virginia cases are collected); 11 Am. & Eng. Ency. Law, 899-916. And see *Burfoot* v. *Burfoots*, 2 Leigh (119); *Taylor* v. *Taylor* (Pa.), 3 Am. Rep. 565.

[1] LIFE ESTATE ENLARGED TO A FEE TAIL.—The effect of the limitation in giving the first taker a fee tail is sometimes ascribed to the doctrine that the *general* overrules the *particular* intent. This explanation, however, has been criticised, and the

§ 18. EFFECT OF THE WORDS IF HE DIE WITHOUT ISSUE ON A PRIOR FEE SIMPLE.—Take a devise "To A and his heirs; and if A die without issue, then to B and his heirs." Here again A takes a fee tail, and B has a vested remainder. A takes the fee tail by implication to effectuate the testator's intent. For the estate of B is to take effect if A dies without issue at any future time, the failure of issue being indefinite; and of course the estate of A is to end when that of B takes effect. The estate, however, given to A *in terms* is a fee simple, and this does not end by *failure of issue;* whereas such failure makes the regular termination of an estate tail. Hence, it is manifest that as B is to take on the failure of the issue of A, A is to keep the land only *so long as he has issue*, and this is a fee tail in A. So the word "heirs" is construed to mean "heirs of the body," and this gives A a fee tail, followed by a vested remainder to B. But for this construction B's estate would be void. For it cannot be a remainder after a fee simple; and as an executory devise it would be void as violating the Rule against Perpetuities, being limited after an indefinite failure of the issue of A, which might not occur for many generations. Thus we see that the legal effect of a devise "To A *for life*, and if he die without issue, remainder to B and his heirs," is identical with that of "To A *and his heirs*, and if he die without issue, remainder to B and his heirs," and that in each case A has a fee tail, followed by a vested remainder. In the one case, A's life estate is *enlarged*, and in the other A's fee simple is *reduced*, to a fee tail; or, as has been said, the life estate is "levelled up," and the fee simple "levelled down," and both meet at the fee tail. *Jiggetts* v. *Davis*, 1 Leigh (368), (418); *Barber* v. *Pittsburgh, etc., R. Co.*, 166 U. S. 83, 104.[1]

doctrine of "general" and "particular" intent has been pronounced "as a general proposition incorrect and vague, and likely to lead in its application to erroneous results." *Doe* v. *Gallini*, 5 B & Ad. 640, per Lord Denman. See also the strong observations of Lord Wensleydale in *Roddy* v. *Fitzgerald*, 6 H. of L. Cas. 823, 877. In 3 Jarm. Wills, 284, it is said that the doctrine in its proper sense is merely descriptive of the operation of the Rule in Shelley's Case.

[1] FEE SIMPLE REDUCED TO A FEE TAIL.—The reason for this construction is thus stated by Preston: "A gift to a man and his *heirs*, and if he shall die without heirs of his body, or without *issue male of his body*, . . . or in like form, then to others conveys an estate tail; for the subsequent words demonstrate the qualified sense in which the word *heirs* is used; and the several parts of the instrument show that no heirs are to be entitled under the terms of the gift, except those which are the issue of the body of the donee." And again: "The whole instrument taken together evinces the meaning of the author of the limitation to be that the property which is the subject of his gift shall revert to himself or be enjoyed by some other person, as soon as there shall be a failure of the *heirs of the body* of the person who takes under the gift in question; and no construction save that only which creates an estate tail

§ 19. NO ESTATE TAIL BY IMPLICATION WHEN THE FAILURE OF ISSUE IS DEFINITE.—In neither of the two cases considered under the two preceding sections can there be an estate tail raised by implication when the failure of issue is definite. *Taylor* v. *Taylor* (Pa.), 3 Am. Rep. 565. The construction is as follows:

(1). Devise to A for life, and if A die without issue *living at his death,* remainder to B and his heirs.

(*a*). *In England.* A takes an estate for life, and B has a remainder in fee, contingent on A's dying without issue living at his death. *Plunkett* v. *Holmes,* 1 Lev. 11; Raym. 28; *Lethieullier* v. *Tracy,* 3 Atk. 774, 793; *Jenkins* v. *Hughes,* 8 H. L. Cas. 571, 593; *Coltsmann* v. *Coltsmann,* L. R. 3 H. L. 132; Fearne, Cont. Rem. 341; 2 Jarm. Wills, 138.

The better opinion in England is that in this case, as well as when A's estate is a fee simple, the words, "if A die without issue living at his death," are but words of contingency, and do not operate by implication to create an estate in A's issue living at his death (if any) as purchasers. *Monypenny* v. *Dering,* 7 Hare, 588; *Coltsmann* v. *Coltsmann,* L. R., 3 H. L. 133, per Cairns, C.; 3 Jarm. Wills, 144. It follows, of course, that as the words, "issue living at his death" are *not words of limitation,* they cannot affect the estate of A, which remains an estate for life.

This construction, which refuses to raise by implication an estate in favor of the issue of A, living at his death, is contrary to a *dictum* of Lord Hardwicke in *Lethieullier* v. *Tracy,* 3 Atk. 796, and is regretted by Jarman as involving the "palpable absurdity of making the estate of the ulterior devisee (B) depend on the contingency of there not being issue (of A), and yet in the alternative event (*i. e.,* when there is issue of A), giving the property neither to A himself nor to such issue,

can give effect to this intention. The operation of the subsequent clause is to abridge and correct the words of limitation used in the preceding sentence by explaining their import; and the words in this clause are allowed to have this effect for the purpose of conforming to the will of the donor, and ascribing to him some meaning in the use of the different clauses of the deed." 2 Prest. Est. 505. See also *Bells* v. *Gillespie,* 5 Rand. 288, 306; *Jiggetts* v. *Davis,* 1 Leigh, 418.

It will be noticed that, in the above extract, Preston is speaking of a *deed.* And it seems to be settled that the effect of the limitation *now* under consideration is the same in deeds and wills, the reasoning being equally applicable to both. The word "issue" does not become a word of limitation (this the law does not allow in a deed), but merely qualifies the meaning of "heirs," showing that heirs *of the body* are meant. See 1 Shepp. Touchstone, *103; 3 Bac. Abr. Estates Tail, B.; 2 Lom. Dig. 222; *Fisher* v. *Wigg,* 1 P. Wms. 14; *Idle* v. *Cook, Ib.* 70; *Morgan* v. *Morgan,* L. R., 10 Eq. 99; *Anderson* v. *Jackson,* 16 Johns. R. 382, 405.

but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator." 3 Jarm. Wills, 139, 144.

(*b*). *In Virginia.* A has a life estate, and there are two remainders in fee upon a contingency with a double aspect, both of which are contingent until the death of A. Upon that event, if there is issue of A living, the first remainder vests in such issue, and the second is defeated; if there is no issue of A living at his death, then the second remainder, to B, vests and takes effect. *Warners* v. *Mason*, 5 Munf. 242; *Wine* v. *Markwood*, 31 Gratt. 43.

This construction differs from that which obtains in England in implying a remainder in favor of the issue of A, if any, living at his death, thus avoiding the absurdity complained of by Jarman. It follows that the reason why A's estate is for life only in Virginia is that though the words, "if A die without issue living at his death," are not mere words of contingency, as in England, yet they are not words of *limitation*, but words of *purchase*, comprising the issue at a particular time; and being words of purchase, they cannot operate to enlarge, or in any wise affect, the previous estate to A. See *Smith* v. *Chapman*, 1 H. & M. 240, 292, 298; *Cooper* v. *Hepburn*, 15 Gratt. 551; *Moon* v. *Stone*, 19 Id. 130, argument of Wm. Green, pages 232, 245; *Daniel* v. *Whartenby*, 17 Wall. 639.

(2). Devise to A and his heirs, and if A die without issue *living at his death*, remainder to B and his heirs. Here A takes a fee simple, and B has a fee, good by way of executory devise, not too remote because of the *definite* failure of issue. *Burfoot* v. *Burfoots*, 2 Leigh (119).

The reason that A's fee simple is not in this case reduced to a fee tail is that "issue living at his death" cannot be regarded as words of limitation to qualify and correct the meaning of the word "heirs." To be a word of limitation, issue must embrace descendants of every degree, and cannot be satisfied by being applied to descendants at a given period; it must "take in all issues to the utmost of the family, as far as heirs of the body would do." 3 Jarm. Wills, 200; *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 882. Hence, it is considered that the testator did not intend by the words, "if A die without issue living at his death," to provide *indefinitely* for the issue of A, but merely to limit a contingency on which the estate of A was to be defeated, and that of B to take effect. For the clause, "if A die without issue," is not absolute and indefinite whensoever he die without issue, but it is with a contingency if he die without issue *living at his death*. *Pells*

v. *Brown*, 3 Cro. (Jac.) 540; *Anon.* 3 Dyer, 354 *a*; *Barnfield* v. *Wetton*, 2 Bos. & Pul. 324; *Coltsmann* v. *Coltsmann*, L. R., 3 H. L. 132; *Jiggetts* v. *Davis*, 1 Leigh, 420; *Thomason* v. *Andersons*, 4 Id. 118; *Jackson* v. *Chew*, 12 Wh. 153; *Abbott* v. *Essex Co.*, 18 How. 202; Wms. R. P. (5th ed.) 215, note, citing American cases; 3 Jarm. Wills, ch. xli.

§ 20. IF HE DIE WITHOUT ISSUE NOW IN VIRGINIA.—By statute taking effect January 1, 1820, the old common law presumption of an indefinite failure of issue was altered in Virginia, and the presumption of a *definite* failure was made to take its place. The language of this most important statute is as follows: "Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue of the body, or offspring, or descendant, or other relative, shall be construed a limitation to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, *living at the time of his death, or born to him within ten months thereafter*, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." See 1 Rev. Code (1819), ch. 99, § 26; Code (1887), § 2422. A similar statute was passed in England, to take effect January 1, 1838. And statutes making the failure of issue definite have been passed in the United States generally.[1]

[1] FAILURE OF ISSUE MADE DEFINITE BY STATUTE IN ENGLAND.—By 1 Vict., ch. 26, § 39, it is declared (3 Jarm. Wills, App'x, 801): "In any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise"; with a further proviso not necessary to be here stated. It will be seen that the English statute does not alter the common law presumption of an indefinite failure of issue, when the person, to the failure of whose issue reference is made, has *already* an estate tail; but the Virginia statute, set out above, makes no such exception, for the reason, no doubt, that in Virginia the prior estate tail is, by the Act of 1776, immediately converted into an estate in fee simple. See *Elys* v. *Wynne*, 22 Gratt. 224.

As to the effect of the English statute on the *implication* of estates tail, it is said by Jarman (2 Jarm. Wills, 143): "No implication of an estate tail can arise from words importing a failure of issue in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue is very distinctly marked," quoting the statute of 1 Vict., ch. 26 above cited. He then goes on to show that in a devise "To A and his heirs; and if A die without issue, to B and his heirs," A will take, under the new rule of construction, an estate in fee simple, subject to an executory devise in favor or B, in the event of A's dying without leaving issue at his death; and that, by a will since 1837, in a gift "To A for life, and if A die without issue, to B," A will take an estate for life only, with a con-

§ 21. EFFECT OF VIRGINIA STATUTES ON LIMITATIONS CONTINGENT ON DYING WITHOUT ISSUE.—These statutes are: (1) Act of October 7, 1776, converting a fee tail into a "full and absolute fee simple" (9 Hen. Stat. 226, see note 1, *infra*); (2) Act taking effect January 1, 1820, making failure of issue definite (see § 20, *supra*); and (3) Act taking effect January 1, 1820, declaring in effect that any limitation that would be valid after an original fee simple shall be valid after a fee tail converted into a fee simple (abolishing the doctrine of *Carter* v. *Tyler*, 1 Call, 165; see note 1, *infra*, also § 22.) Code Va., §§ 2421–'22. Let us now examine the following limitations at common law and under these statutes.[1]

tingent remainder to B, to take effect in the event of A's dying without issue living at his death. But that there is in England no implication of a remainder in favor of the issue of A living at his death, if such there be, see § 19, (1), *supra*. And see, also as to the effect of the English statute, Wms. R. P. (17th ed.), 291; Hawkins, Wills (2d Am. ed.), 214.

[1] ALTERATION OF LAW BETWEEN THE EXECUTION OF A WILL AND THE DEATH OF THE TESTATOR.—Upon the general question, see Bigelow on Wills (Student's Series), 278–'79, where it is said: "The validity of the execution of a will is to be determined by the law in force at the testator's death. A statute changing the requirements for execution is not open to the objection that it operates retrospectively, because the execution of the will has no force until the death of the testator. Again, if a statute should alter the effect of the dispositions made in a will, and the testator should allow the will to stand unchanged, it would be presumed, in England, that it was his intention that the will should operate according to the change in the law. *Hasluck* v. *Pedley*, L. R. 19 *Eq.* 271. But in some of our States it is held that, in regard to questions of property, the law which was in force when the will was executed is to be applied. Both views, no doubt, stand upon the ground of supposed intention of the testator." When the law as it is at the *death* of the testator does not apply (as it does not by express provision of the Wills Act of 1 Vict. ch. 26, § 34), it has been held that if a change of law as to the operation of a will is made between the date of the will (*i. e.*, the time of writing it) and its actual execution, it is to be construed according to the law in force at the time it was executed. *Randfield* v. *Randfield*, 8 H. of L. Cas. 225; 29 Am. & Eng. Ency. Law, 355, note.

With reference to the Virginia statutes, referred to above, the act of October 7, 1776, abolishes estates tail without reference to the time of their creation, declaring that "every person who now hath, or hereafter may have, an estate in fee taille, general or special, in any lands, . . . whether such estate taille hath been or shall be created by deed, will, act of assembly or by any other ways or means, shall from henceforth, or from the commencement of such estate taille, stand *ipso facto* seised . . . of such lands . . . in full and absolute fee simple." 9 Hen. Stat. 226.

As to the two acts going into effect January 1, 1820 (the one making the failure of issue *definite*, and the other abolishing the doctrine of *Carter* v. *Tyler*), the language of 1 Rev. Code of 1819, ch. 99, §§ 25 and 26, makes it clear that both acts are applicable to wills *made* before January 1, 1820, if the testator *died* on or after that date. By § 25: "Every estate in lands which shall be limited by any deed hereafter made, *or by the will of any person who shall hereafter die*, so that, as the law was on the seventh day of October, in the year of our Lord one thousand seven hundred and seventy-six, such an estate would have been an estate tail, shall be deemed to be an estate in fee simple, in the same manner as if it had been limited by those technical words which, at the common law, are appropriate to create an estate in fee simple; *and every limitation upon such an estate shall be held valid if the same would be valid when limited upon an estate in fee simple, created by technical language as aforesaid.*" The

§ 22. I. DEVISE TO A FOR LIFE, AND IF A DIE WITHOUT ISSUE, REMAINDER TO B AND HIS HEIRS.

(1). *In Virginia, before October 7, 1776.* Same as at common law. A has a fee tail by implication, and B has a vested remainder in fee simple. See § 17, *supra.*

(2). *From October 7, 1776, to January 1, 1820.* A has a fee simple, the act of 1776 converting the implied fee tail into a "full and absolute" fee simple. Then B's estate cannot be a remainder, because no remainder can follow a fee simple. Neither is it allowed to be an executory devise, by the doctrine of *Carter* v. *Tyler* (as to which, see below); and, if it could be allowed to be an executory devise, it would violate the rule against perpetuities, because it is to take effect after an *indefinite* failure of issue. So A takes the fee simple, and B takes nothing. *Tate* v. *Tally*, 3 Call, 354.

N. B. The doctrine in Virginia of *Carter* v. *Tyler*, as it is called, is the doctrine which declares that in no case can an executory devise follow a fee tail raised to a fee simple by the statute of 1776 abolishing estates tail, and converting them into estates in fee simple. For this doctrine two reasons are given, namely: (a) That before the statute operated on the fee tail, there was a moment of time when the limitation over after the fee tail was a remainder; and this remainder could not turn into an executory devise by matter *ex post facto*, for the maxim is, "Once a remainder, always a remainder" (see § 9, *supra*); and (b) That when the statute of 1776 declared that every estate tail should become a "full and absolute fee simple," it necessarily avoided an executory devise after a fee tail so converted; for the effect of an executory devise after a fee simple is to make the fee *defeasible* on the happening of the event on which the executory devise

last clause of § 25 abolishes the doctrine of *Carter* v. *Tyler*. Then follows § 26, rendering the failure of issue definite, which begins thus: "Every contingent limitation *in any such deed or will*, made to depend on the dying of any person without heirs," etc. (For the statute as it now stands in the Code of 1887, § 2422, see § 20, *supra*.) What is meant by "any *such* deed or will"? Referring to § 25, it is plain that it means "any deed hereafter made, *or the will of any person who shall hereafter die*," thus making the new law applicable if the testator *died* after the statute went into operation, regardless of the time of the execution of the will.

With regard to the Virginia Wills Act taking effect July 1, 1850, it is expressly provided by § 22 of ch. 122 of the Code of 1849, that, "The preceding sections of this chapter shall not extend to any will made before this act is in force; but the validity and effect of such will shall be determined by the laws in force on the day before this chapter takes effect, in like manner as if these laws, so far as they relate to the subject, were herein enacted in place of such sections. Every will re-executed or republished or revived by any codicil shall, for the purposes of this chapter, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived." And see Code of 1887, § 2532. Also *Raines* v. *Barker*, 13 Gratt. 128.

depends; and this is inconsistent with a *full and absolute* fee simple in the first taker. *Carter* v. *Tyler*, 1 Call, 165; *McClintic* v. *Manns*, 4 Munf. 328; *Ball* v. *Payne*, 6 Rand. 73; *Bramble* v. *Billups*, 4 Leigh, (90); *Callis* v. *Kemp*, 11 Gratt. 78. See *Moore* v. *Brooks*, 12 Gratt. 135.

(3). *From January 1, 1820, to the present time.* A has a life estate not enlarged to a fee-tail, because failure of issue is made *definite* by the act of January 1, 1820. And there are two remainders in fee upon a contingency with a double aspect, both of which remain contingent until the death of A, the one to the issue of A *living at his death, or born to him within ten months thereafter*, and the other to B. On A's death, if there is issue of A then living, etc., the first remainder vests in such issue, and the second is defeated; but if there is no issue of A, living at his death, etc., then the second remainder, to B, takes effect. See § 19, *supra*. The form of the limitation under the statute is, in effect, "To A for life; and if A die without issue *living at his death, or born to him within ten months thereafter*, then to B and his heirs." *Jiggetts* v. *Davis*, 1 Leigh (Va.), 419; *Wine* v. *Markwood*, 31 Gratt. 43, 51; *Sutherland* v. *Sydnor*, 84 Va. 880. See *Warners* v. *Mason*, 5 Munf. (Va.) 242.

§ 23. EFFECT OF DEFINITE FAILURE OF ISSUE ON RULE IN SHELLEY'S CASE.—VIEW OF PROFESSOR MINOR.—It will be remembered that in the above limitation, "To A for life, and if A die without issue, remainder to B and his heirs," A takes at common law a fee-tail by the implication of a remainder to the issue of A, following A's express life estate, and the consequent operation of the Rule in Shelley's Case. For at common law the failure of A's issue is indefinite, and the word "issue" therefore embraces the whole line of A's issue, his whole inheritable blood, and "takes in all issues to the utmost of the family, as far as heirs of the body would do." It is therefore a word of limitation and not of purchase. 3 Jarm. Wills, 200; *Roddy* v *Fitzgerald*, 6 H. of L. Cas. 882. But by the Virginia statute of 1820, the failure of issue is made *definite*, and the remainder implied in favor of the issue of A is confined to *issue living at the time of his death, or born to him within ten months thereafter;* and this prescription of a definite time makes such issue a particular class as of that time, and the word "issue" becomes *descriptio personarum* and a word of purchase, instead of *nomen collectivum* and a word of limitation. Hence the Rule in Shelley's Case has no application, and cannot operate to enlarge the estate of A, which remains as previously

limited.[1] See *Lethieullier* v. *Tracy*, 3 Atk. 784, 796; *Smith* v. *Chapman*, 1 H. & M. (Va.) 240, 292, 298; *Jiggetts* v. *Davis*, 1 Leigh (368), (418); *Nowlin* v. *Winfree*, 8 Gratt. 346, 348; *Tinsley* v. *Jones*, 13 Id. 289, 296; *Cooper* v. *Hepburn*, 15 Id. 551; *Moon* v. *Stone*, 19 Id. 130, 232, 245; *Daniel* v. *Whartenby*, 17 Wall. 639; *Va. Law Journal*, April, 1880, article entitled, "Dying Without Issue under Virginia Statutes"; *Va. Law Journal*, October, 1883, article entitled, "The Effect of a Definite Failure of Issue on the Operation of the Rule in Shelley's Case." See, however, 2 Minor's Ins. 453–457 (3d ed.), 458–462 (4th ed.), where it is contended that the statute of 1820, making the failure of issue definite, had no effect upon the implication of an estate tail; so that A's life estate is first raised to a fee tail, and then by the statute of 1776 is converted into a fee simple, after which the fee simple to B is good as an executory devise; and that this continued to be the law of Virginia until the statute of July 1, 1850, abolishing the Rule in Shelley's Case, after which A takes a life estate, followed by a contingency with a double aspect, as is explained above. But this doctrine of Professor Minor, as to the effect of the statute of 1820, is not sustained by authority, and is believed to be unsound in principle.[2]

[1] The doctrine that estates tail continue to be created "as the law was aforetime," *i. e.*, on October 7, 1776, can have no application in this connection, because the statute of 1819 makes "die without issue," wherever it occurs, equal to "die without *issue living at his death*," etc.; and *this* limitation, as the law was aforetime, did *not* create an estate tail. For the extent of the doctrine referred to, see *Carter* v. *Tyler*, 1 Call, 165; *Hill* v. *Burrow*, 3 Id. 342; *Tate* v. *Tally*, *Ib.* 354; *Tidball* v. *Lupton*, 1 Rand. 194; *Goodrich* v. *Harding*, 3 Id. 280; *Bells* v. *Gillespie*, 5 Id. 273; *Ball* v. *Payne*, 6 Id. 73; *Jiggetts* v. *Davis*, 1 Leigh (368); *Bramble* v. *Billups*, 4 Id. (90); *Thomason* v. *Anderson*, *Ib.* (115); *See* v. *Craigen*, 8 Id. 449; *Tinsley* v. *Jones*, 13 Gratt. 289. For a correct statement of the result of these cases, the reader is referred to 3 Lom. Dig. (211.) For a clear explanation of the effect of the act of 1785, see opinion of Moncure, P., in *Tinsley* v. *Jones*, 13 Gratt. 296–'97.

[2] THE IMPORTANCE OF THE CONSEQUENCES WHICH FLOW FROM THE OPPOSING VIEWS.—When the form of limitation is "*To A and his heirs*, and if he die without issue, to B," it can make no difference, since the legislation of 1819, abolishing the doctrine of *Carter* v. *Tyler*, and removing the objection of remoteness as to B's estate, whether A be considered to have a fee simple by original limitation, or a fee simple by first reducing the fee to a fee tail, by implication, and then restoring it to the dignity of a fee by virtue of the statute of 1776. *Corr* v. *Porter*, 33 Gratt. 278. But it is far otherwise when the form of the limitation is, "*To A for life*, and if he die without issue, to B." For here, if A's life estate is enlarged, by implication, to a fee tail, and then made a fee by the statute, then if A die without issue living at his death, etc., the fee will shift to B, subject to a right of dower in favor of the widow of A; or, if A were a female, her husband would have curtesy, other requisites being present. *Jones* v. *Hughes*, 27 Gratt. 560; *Medley* v. *Medley*, *Ib.* 568; *Corr* v. *Porter*, *supra*. But, of course, if A's estate remains for life only, there will be neither dower nor curtesy.

Again, while it is true that if there be *no* issue of A living at his death, etc., the

§ 24. II. DEVISE TO A AND HIS HEIRS, AND IF A DIE WITHOUT ISSUE, REMAINDER TO B AND HIS HEIRS.

(1). *In Virginia, before October 7, 1776.* Same as at common law. A has a fee tail, by implication, and B has a vested remainder. See § 18, *supra.*

(2). *From October 7, 1776, to January 1, 1820.* A has a "full and absolute" fee simple by the effect of the statute of 1776 on the estate tail created by implication. B's estate is void as a *remainder* since no remainder can follow a fee simple; and as an *executory devise* it cannot be allowed because of the doctrine of *Carter* v. *Tyler;* and besides it would violate the Rule against Perpetuities because of the indefinite failure of issue. *Hill* v. *Burrow,* 3 Call, 342; *Eldridge* v. *Fisher,* 1 H. & M. 559; *Sydnor* v. *Sydnors,* 2 Munf. 263; *Bells* v. *Gillespie,* 5 Rand. 273; *Broaddus* v. *Turner,* 5 Id 308; *Tinsley* v. *Jones,* 13 Gratt. 289; *See* v. *Craigen,* 8 Leigh, 449.

(3). *From January 1, 1820, to the present time.* A has a fee simple, and B has a good executory devise of a fee after a fee. A's fee simple is by the original limitation to him and his heirs, and not by the effect of the statute of 1776 on an estate tail. For as the failure of issue is now definite, no estate tail can be raised by implication; and the fee simple to A remains a fee simple. And the executory devise to B does not violate the Rule against Perpetuities, because the failure of issue is *definite,* and B is to take if A has no issue *living at his death* or born within ten months thereafter. See *Corr* v. *Porter,* 33 Gratt. 278; *Randolph* v. *Wright,* 81 Va. 608; *Pettyjohn* v. *Woodroof,* 77 Va. 507; *Tomlinson* v. *Nickell,* 24 W. Va. 148.

N. B. It should be observed that if in a devise since January 1, 1820, the form of limitation is, "*To A,* and if A die without issue, to B and his heirs," this is in effect, "*To A and his heirs,* and if A die

land will go over to B, whether A be considered to have a life estate or a fee simple: yet the consequences, when there *is* issue of A, are by no means the same in the two cases. For if A have the *fee,* subject only to go over to B on the happening of the contingency, then when the contingency does *not* happen, A has an absolute fee, with which he can do what he wills. But if there be issue of A, when A has a life estate only, such issue, living at his death, etc., are entitled to the estate as purchasers, and their interest can in no wise be affected by any act of A's. *Wine* v. *Markwood,* 31 Gratt. 50.

It may be remarked that the question which has been discussed may yet arise upon wills subject to the law as it was prior to July 1, 1850. For until the death of the tenant for life, when the contingency of dying without issue living at his death, etc., is decided, the statute of limitation does not begin to run; and as the first taker may be an infant at the death of the testator, litigation may be thus postponed for many years. In the case of *Pettyjohn* v. *Woodroof,* 77 Va. 507, the testator died in 1822, but as the first taker lived until 1875, a suit commenced in 1877 was in time.

without issue, to B and his heirs." See *Tinsley* v. *Jones*, 13 Gratt. 289, 297; *Jones* v. *Hughes*, 27 Gratt. 560; *Medley* v. *Medley*, Ib. 568; *Wine* v. *Markwood*, 31 Gratt. 43. And the law is the same now in England since 1837. 2 Jarm. Wills, 144.

§ 25. III. DEVISE TO A AND THE HEIRS OF HIS BODY; AND IF A DIE WITHOUT ISSUE, THEN TO B AND HIS HEIRS.

(1). *In Virginia, before October 7, 1776.* A has a fee tail by express limitation; B has a vested remainder, to take effect whenever the issue of A fails, whether at A's death or at any subsequent time. Gray, Perpetuities, § 111.

(2). *From October 7, 1776, to January 1, 1820.* A has a "full and absolute" fee simple by the operation of the statute of 1776 upon the express fee tail. B takes nothing. The limitation over to B cannot be good as a remainder, for it follows the fee simple to A; and as an executory devise, it is void by the doctrine of *Carter* v. *Tyler*, and also because it would violate the Rule against Perpetuities, being limited to take effect after an *indefinite* failure of issue. *Hunter* v. *Haynes*, 1 Wash. (Va.) 292; *Tidball* v. *Lupton*, 1 Rand. 194.

(3). *From January 1, 1820, to the present time.* A has a fee simple by the operation of the statute of 1776 upon his express fee tail; B has a good executory devise of a fee on a fee, the doctrine of *Carter* v. *Tyler* having been abolished in 1820, and the failure of issue made definite. It is, therefore, allowed to be an executory devise; and, as such, it does not violate the Rule against Perpetuities.

N. B. When a devise is "To A and the heirs of his body," or "To A and his issue," with a limitation over after a *definite* failure of issue ("if A die without issue *living at his death*," *e. g.*), the only effect of the definite failure of issue is to make *the limitation over contingent* upon such failure; the words "if he die without issue living at his death," etc., are not considered explanatory of the species of issue included in the *prior devise*, and, therefore, do not prevent the prior devisee from taking an estate tail under it. 3 Jarm. Wills, 239; *Elys* v. *Wynne*, 22 Gratt. 224; *Atkinson* v. *McCormick*, 76 Va. 791; *Stokes* v. *Van Wyck*, 83 Va. 724. But while a definite failure of issue does not affect an *express* estate tail previously limited, it prevents the *implication* of an estate tail, when the previous estate is for life or in fee simple; for the words "issue living at his death," etc., are either words of *purchase* or of *contingency*, and not words of *limitation;* and only words of limitation can enlarge or reduce the express estate previously limited. See § 19, *supra*.

§ 26. IV. DEVISE TO A AND THE HEIRS OF HIS BODY; AND IF A DIE WITHOUT ISSUE LIVING AT HIS DEATH, THEN TO B AND HIS HEIRS.

(1). *In Virginia, before October 7, 1776.* A has a fee tail by express limitation, and B a contingent remainder under Fearne's First Class, by reason of the contingent determination of A's estate tail. For the testator has made the failure of A's issue definite, so that the word's "if A die without issue living at his death" are words of contingency; and B is to take only if no issue be living at A's *death*, and not on the *subsequent* failure of A's issue. See Fearne, Remainders, p. 5, n. (d).

(2). *From October 7, 1776, to January 1, 1820.* A's express fee tail is converted into a "full and absolute fee simple," as we have seen, after which no executory devise can follow, by the doctrine of *Carter* v. *Tyler*. B's estate cannot be a remainder after the fee simple; and as *Carter* v. *Tyler* does not allow it to be an executory devise, it is void. This was the form of limitation in *Carter* v. *Tyler*, 1 Call, 165. See *Broaddus* v. *Turner*, 5 Rand. 317.

(3). *From January 1, 1820, to the present time.* A has a fee simple, and B has a good executory devise, the doctrine of *Carter* v. *Tyler* having been abolished January 1, 1820. See § 21, *supra*. B's executory devise is not too remote, as it must take effect, if ever, at the death of A having no issue then living.[1]

[1] CARTER V. TYLER.—As to the doctrine of *Carter* v. *Tyler*, it may be observed that it applied to every case where the first estate was an estate tail, rendering the limitation over void after such estate tail converted by the act of October 7, 1776, into a fee simple. It follows that although estates tail ceased to be *raised by implication* in Virginia after the act of 1819, taking effect January 1, 1820, changing the meaning of "dying without issue" from an indefinite to a definite failure of issue, yet the doctrine of *Carter* v. *Tyler*, if it had not been abolished, would have still applied where the first taker had an estate tail, by *express limitation*, not dependent on the effect of the words "dying without issue." *Carter* v. *Tyler* was itself a case of this kind, the devise being, "To W. C. *and his heirs lawfully begotten*," which words of themselves created an estate tail. See 3 Jarm. Wills, 91, and cases cited, and *Broaddus* v. *Turner*, 5 Rand. 317, opinion of Coalter, J. Judge Carr, however, thought these words gave a fee simple to W. C., which was reduced to a *fee tail* by the limitation over after an *indefinite* failure of issue. See his opinion in *Bells* v. *Gillespie*, 5 Rand. 280-'82, and in *Broaddus* v. *Turner*, *Ib.* 309. It seems, however, that Judge Carr was mistaken in supposing that the words, "To W. C. and his heirs lawfully begotten," in the devise in *Carter* v. *Tyler*, gave W. C. the fee simple by *express* limitation. And as to the failure of issue in that case, while there was no decision on that point by the court, yet it was assumed by counsel on both sides to be *definite*, as otherwise the limitation over would have been clearly void for remoteness, without reference to the questions discussed by counsel and decided by the court.

In *Elys* v. *Wynne*, 22 Gratt. 224 (see § 27, *infra*), the limitation in the will of a testator who died in 1833 was, "To D and the heirs of her body, but if she die without such heir, then over." Here there was an estate tail created by express words, con-

§ 27. EXECUTORY LIMITATIONS BEFORE AND AFTER JANUARY 1, 1820.—It is manifest that January 1, 1820, is an epoch in the history of executory limitations in Virginia depending on dying without issue. Before that date, either the indefinite failure of issue or the doctrine of *Carter* v. *Tyler* made the limitation over void; but when, by act of 1820, the failure of issue became definite, and the doctrine of *Carter* v. *Tyler* was abolished, such executory limitations became valid, and have greatly flourished ever since. A good example of the effect of the acts of 1820 is furnished by the case of *Elys* v. *Wynne*, 22 Gratt. 224. (See § 26, *supra*, note.) In 1833 the testator made his will and died. He devised land to D and the heirs of her body; but should D die without heir as above mentioned, then the land to be sold, and the money equally divided among all his heirs. *Held*, D took a fee simple in the land, defeasible on her dying without such heir living at her death or born to her within ten months thereafter, in which case the other heirs of the testator would take. Had the devise been subject to the law before 1820, the limitation over would have been void. For Tabular View, see *infra*, § 28.

verted by the statute of 1776 into a fee simple; and a limitation over after a *definite* failure of issue. But this limitation would have been rendered void by the doctrine of *Carter* v. *Tyler*, had that doctrine continued in force. It was not enough, therefore, by the legislation of 1819, to make the failure of issue *definite*, as this only made good the limitation over after what would otherwise have been an estate tail *by implication;* but it was also necessary to declare, as was done by the other statute of 1819, that any limitation which would be good after a fee simple originally limited should be good after any fee tail converted by the act of 1776 into a fee simple, thus effectually abolishing the doctrine of *Carter* v. *Tyler*.

It may be remarked that when the first taker is a woman (see *Elys* v. *Wynne*, *supra*), in order that there may be issue born to her after her death, it is necessary to suppose (if indeed the Cæsarean operation be not performed) that she had a son who married and died in her lifetime, leaving his wife *enceinte* of a child, whose birth takes place after the death of the first taker, its grandmother. Such a case is put by Judge Carr in *Thomason* v. *Andersons*, 4 Leigh (125).

§ 28. TABULAR VIEW OF LIMITATIONS OVER AFTER DYING WITHOUT ISSUE.

EFFECT OF LIMITATIONS OVER AFTER DYING WITHOUT ISSUE.

FIRST PERIOD.—At common law and in Virginia before October 7, 1776.	SECOND PERIOD.—In Virginia from October 7, 1776, to January 1, 1820.	THIRD PERIOD.—In Virginia from January 1, 1820, to the present time.
I.—*Devise to A for life; and if A die without issue, to B and his heirs.*		
A has a fee tail by implication; and B has a vested remainder. See § 22, (1). Also, § 17.	A has a "full and absolute" fee simple. B takes nothing. See § 22, (2).	A has a life estate, followed by a contingency with a double aspect. See § 22, (3); also § 23.
II.—*Devise to A and his heirs; and if A die without issue, to B and his heirs.*		
A has a fee tail by implication; and B has a vested remainder. See § 24, (1). Also, § 18.	A has a "full and absolute" fee simple. B takes nothing. See § 24, (2).	A has a fee simple; and B has a good executory devise of a fee after a fee. See § 24, (3).
III.—*Devise to A and the heirs of his body; and if A die without issue, to B and his heirs.*		
A has a fee tail by express limitation; and B has a vested remainder. See § 25, (1).	A has a "full and absolute" fee simple. B takes nothing. See § 25, (2).	A has a fee simple; and B has a good executory devise of a fee after a fee. See § 25, (3).
IV.—*Devise to A and the heirs of his body; and if A die without issue living at his death, to B and his heirs.*		
A has a fee tail by express limitation; and B has a contingent remainder. See § 26, (1).	A has a "full and absolute" fee simple. B takes nothing. See § 26, (2).	A has a fee simple; and B has a good executory devise of a fee after a fee. See § 26, (3).
Period of remainders.	Period of void limitations over.	Period of valid limitations over.

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